



McGuinness, S. (2011). A, B, and C leads to D (for Delegation!): A, B and C v. Ireland 25579/05 [2010] ECHR 2032 . *Medical Law Review*, 19(3), 476-491. <https://doi.org/10.1093/medlaw/fwr021>

Peer reviewed version

Link to published version (if available):
[10.1093/medlaw/fwr021](https://doi.org/10.1093/medlaw/fwr021)

[Link to publication record in Explore Bristol Research](#)
PDF-document

This is a pre-copyedited, author-produced PDF of an article accepted for publication in *Medical Law Review* following peer review. The version of record *Medical Law Review*, 19, Summer 2011, pp. 476–491 is available online at: <http://www.scopus.com/inward/record.url?scp=80051998688&partnerID=8YFLogxK>.

University of Bristol - Explore Bristol Research

General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available:
<http://www.bristol.ac.uk/red/research-policy/pure/user-guides/ebr-terms/>

A, B, AND C LEADS TO D (FOR DELEGATION!)

Sheelagh McGuinness*

A, B and C v. Ireland 25579/05 [2010] ECHR 2032

I. INTRODUCTION

The case of *A, B, and C v Ireland* is the latest in a series of cases brought against the Irish Government because domestic legislation is argued to be outside of international human rights norms.¹ The case involved three women who felt, for different reasons, that their rights under Articles 2, 3, 8 and 14 of the European Convention on Human Rights (ECHR) had been breached because they had to travel to Great Britain in order to have a safe and legal abortion. The circumstances of the three individual women were different, but they belong to a large community of women who are forced each year to travel overseas in order to access abortion services, following what Rossiter calls ‘the abortion trail’.²

The judgement in this case exemplifies the consequences of an approach to abortion regulation where a government ‘chooses’ to facilitate abortion services through ‘delegation and doubt’.³ It does this not just by endorsing the current Irish approach to facilitating abortions for ‘health and well being’ reasons but also through refusing to push for an Article 8 based right to abortion, choosing instead to equate the question of the regulation of abortion services with that of answering the question of when ‘life begins’.⁴

The judgement does not try to widen the category of cases when abortion would be legal in Ireland – abortion is currently permissible when there is a risk to the pregnant woman’s life (C) as distinct from to her health and well-being (A and B). Rather, it pushes the Irish government to provide guidance on those abortions that are already legal. The Court rejected the complaints of A and B for reasons which will be explained later. In finding that C’s Article 8 rights had been breached the Court echoed the earlier decision of *Tysiac v Poland*,⁵ where it was held that a State that permits abortion must implement a “legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion”.⁶ Therefore, optimistically this case might

* Lecturer, Centre for Professional Ethics, School of Law, Keele University, UK.
S.McGuinness@peak.keele.ac.uk

¹ *A, B and C v. Ireland* - 25579/05 [2010] ECHR 2032 (16 December 2010) [Hereafter “A, B, and C”]. For previous cases see *Open Door and Dublin Well Woman v Ireland* - 14234/88 [1992] ECHR 68 (29 October 1992) This case concerned the provision of information about abortion services; *Norris v Ireland* - 10581/83 [1988] ECHR 22 (26 October 1988) This case concerned domestic prohibitions on homosexual activity.

² Ann Rossiter *Ireland’s Hidden Diaspora* (London: Iasc Publishing, 2009)

³ Marie Fox and Therese Murphy ‘Irish Abortion: Seeking Refuge in a Jurisprudence of Doubt and Delegation’ (1992) 19 *Journal of Law and Society* 454-466.

⁴ *A, B and C* at 237

⁵ *Tysiac v. Poland* - 5410/03 [2007] ECHR 212 (24th September 2007)

⁶ *A, B and C* at 267.

force the Irish government to answer three questions that were posed by Mr Justice McCarthy in the 'X Case', discussed below⁷:

- What are pregnant women to do?
- What are the parents of pregnant girls to do?
- What are doctors to do?
-

However, it certainly does not lead to any principled liberalisation of domestic Irish law on abortion and the recent report of the Irish government on how it plans to deal with the decision suggest that the answers to these questions will not be imminent.⁸ The judgement will disappoint anyone who hoped that the European Court of Human Rights (ECtHR) was 'champing at the bit'⁹ to enshrine a Convention right to abortion, as one thing that is resoundingly clear in the wake of this case is that the ECHR *does not* confer a right to abortion.¹⁰

In this case note I will discuss the significance of this case for Irish approaches to regulation of abortion services. I will also mention how the Court facilitated Ireland's *unusually*¹¹ restrictive abortion laws through its application of the margin of appreciation.

II. BACKGROUND

In order to understand the significance of this case for Irish law on abortion, it is important to recognise the historical and jurisprudential context. Abortion in Ireland is regulated under a web of Constitutional provisions, legislation, and case law. I will take the Offences Against the Person Act 1861 (OAPA) as my starting point. Sections 58 and 59 of this Act outlaw abortion with a threat of penal servitude for those who procure or attempt to procure a miscarriage in a pregnant woman.¹² In England the Act has been read in light of the case of *R v Bourne*,¹³ where McNaughton J accepted that the existence of the word 'unlawful' in the Act allowed for a category of legal abortion. It is unlikely that this represents the law in Ireland.¹⁴ Although the issue was not litigated on directly, the Court in *A, B, and C* noted the *obiter dicta* of Keane J in the case of *Society for the Protection of the Unborn Child (Ireland) Ltd (SPUC) v Grogan and Ors*:

⁷ Jennifer Schweppe 'A, B and C v. Ireland: How to Respond.'

<http://www.humanrights.ie/index.php/2011/01/14/a-b-c-v-ireland-how-to-respond/> (Accessed June 27th 2011)

⁸ 'ACTION PLAN A, B, and C v. Ireland Application no 25579/2005, Grand Chamber judgment 16th December 2010, Information submitted by the Government of Ireland on 16th June 2011' <http://www.dohc.ie/press/releases/2011/20110616.html> (Accessed June 25th 2011)

⁹ Paolo Ronchi 'A B and C v Ireland Europe's Roe v Wade still has to wait' *Law Quarterly Review* (Forthcoming)

¹⁰ *A, B, and C* at 214.

¹¹ Unusual in comparison to regulation in other jurisdictions that have ratified the Convention.

¹² Offences Against the Person Act 1861 ss. 58 and 59

¹³ [1939] 1 KB 687

¹⁴ James Kingston, Anthony Whelan and Ivana Bacik, *Abortion and the Law*, (Round Hall Sweet and Maxwell, Dublin, 1997) Chapter 1.

“... the preponderance of judicial opinion in this country would suggest that the *Bourne* approach could not have been adopted ... consistently with the Constitution prior to the Eighth Amendment.”¹⁵

Sections 58 and 59 of the OAPA were reaffirmed in the Health (Family Planning) Act 1979.¹⁶

The next major legislative provision that should be noted is Article 40.3.3 of the Irish Constitution. This was the 8th amendment to the Irish Constitution and states that:

"3° The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

This provision came about as a result of unease at the idea that abortion might fall within the sphere of Constitutional privacy rights as happened in the USA in *Roe v Wade*.¹⁷ It has generally been interpreted as a strictly anti-abortion provision, notwithstanding that it is not framed as such, and rather imposes a positive obligation on the State to vindicate and protect the right to life of the unborn. What ‘the equal right to life’ amounts to in practice has not been further explicated although there have been a number of cases where the Article is examined and it is to these I will turn next.

1992 was an important year in the development of abortion regulation in Ireland because of the coincidence of the *X Case*, and the ratification of the Maastricht Treaty, which I discuss below.¹⁸ Whether or not a consensus existed on the legality of abortion prior to 40.3.3, *X* made clear that there is a category of legal abortion in Ireland.¹⁹ In *X*, a 14-year-old girl was pregnant as a result of rape. Her parents sought advice on whether tissue from the foetus could be used in evidence against the alleged rapist. The police referred the case to the Attorney General who stated that the girl should be prohibited from travelling to Britain to obtain an abortion. The case eventually went to the Supreme Court, which ruled that:

“if it is established that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible.”²⁰

In the wake of the *X case* there was a further referendum to amend 40.3.3. Three questions were put to the Irish people:

- 1) Whether suicide should be removed as a ground for legal abortion

¹⁵ [1989] IR 753

¹⁶ Health (Family Planning) Act 1979 s.10

¹⁷ *Roe v. Wade* (410 US 113 (1973))

¹⁸ Christa van Wijnbergen ‘Ireland and the ratification of the Maastricht Treaty’ in Finn Laursen and Sophie Vanhoonacker (eds) *The Ratification of the Maastricht Treaty: Issues, Debates and Future Implications* (Martinus Nijhoff Publishers, Dordrecht; 1994)

¹⁹ *Attorney General v. X*. [1992] 1 I.R. 1

²⁰ *Ibid* at 37.

- 2) Whether women should have the freedom to travel to another jurisdiction to obtain an abortion
- 3) Whether there should be freedom of information within Ireland about abortion services in other jurisdictions.

The first was rejected and the other two were passed, meaning that 40.3.3 now contains provisions to protect the right of Irish women to access information about abortion services abroad and also to travel to obtain those services. In 2002 the Irish voters rejected another amendment that would have tightened the prohibition on abortion by removing suicide as a ground for legal abortion.²¹ The decision in *X* has been reaffirmed in a number of cases, most notably the *C* case in 1997, which involved a 13-year-old girl who was pregnant as a result of rape and travelled to England to have an abortion.²²

In summary then, since the *X* case there has been a category of legal abortions in Ireland. However, to fully understand abortion law in Ireland it is not enough simply to examine cases and statute; it is crucial to consider the severe government inertia on the issue. In the *X* Case McCarthy J. stated that:

“[t]he failure of the Legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable.”²³

This statement has been echoed by other judges most recently in the case of *MR v TR*.²⁴ So while it has been clear since *X* that abortion is lawful when the life of the pregnant woman is threatened (including when the threat to life is from suicide) there has been no further clarification as to what this means in practice. This is despite the calls from the courts, as well as from civil society groups,²⁵ government committees,²⁶ and even the Council of Europe Commissioner on Human Rights²⁷ for legislation on the issue. How often abortion occurs in Ireland is unknown because the government does not collect figures on this, although it does so for women who travel to the UK for abortions.²⁸

²¹ *Attorney General v. X*. [1992] 1 I.R. 1

²² *A and B v. Eastern Health Board, Judge Mary Fahy and C, and the Attorney General (notice party)*, [1998] 1 IR 464

²³ *Attorney General v. X*. [1992] 1 I.R. 1 at 147.

²⁴ *Roche v. Roche and Ors* [2009] IESC 82

²⁵ See, for example, the Irish Council for Civil Liberties policy document on abortion legislation, *The Need for Abortion Law Reform in Ireland: The Case Against the Twenty-Fifth Amendment of the Constitution Bill, 2001*. (Dublin: ICCL; 2002).

²⁶ *Report of the Constitution Review Group*. Dublin: Stationery Office; 1996. *Fifth Progress Report: Abortion*. (Dublin: Stationery Office; 2000).

²⁷ ‘European Human Rights chief hits out at lack of abortion laws here’ *The Independent* <http://www.independent.ie/national-news/european-human-rights-chief-hits-out-at-lack-of-abortion-laws-here-1363521.html> (Accessed June 25th 2011). This visit was in the wake of Parliamentary Assembly Council of Europe Resolution 1607 (2008) ‘Access to safe and legal abortion in Europe’ <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1607.htm#1>. For a more recent criticism see ‘Coalition urged to clarify law on abortion’ *The Irish Times* <http://www.irishtimes.com/newspaper/ireland/2011/0606/1224298469050.html> (Both accessed June 25th 2011)

²⁸ ‘Ireland: Abortion Limits Violate Human Rights’ <http://www.hrw.org/en/news/2010/01/28/ireland-abortion-limits-violate-human-rights> (Accessed June 15th 2011)

So what are women to do if they find themselves pregnant in Ireland and wish to terminate the pregnancy? They can go to the Courts and seek a declaration that a termination is justified if they feel they meet the criteria set out in *X* and wish to have the termination carried out in Ireland. As noted in *A, B, and C*, judges have expressed their unease at the idea that the Courts should be considered as “some kind of licensing authority for abortions”.²⁹ And even if a declaration is granted because of the ambiguity surrounding the status of legal abortion provision it is unclear whether an abortion would happen within the State.³⁰ Other than (and probably along with) going to the Courts, women can travel overseas to access safe and legal abortion services.

In taking a case to the ECtHR, *A, B, and C* wished to demonstrate that Irish legislation breached their Convention rights. Although the Irish Constitution is the highest and most binding form of legislation in Ireland, the ECHR is internationally binding on all States that have ratified it. The ECHR was enshrined in Irish domestic law through the European Convention on Human Rights Act 2003, sections 3 and 4 of which bind the executive and judiciary to consider the ECHR when carrying out their functions.³¹

III. THE CASE

A. Facts and Issues for the Court

On the 15th of July 2005 'A', 'B', and 'C' lodged their complaint against the Irish Government with the ECtHR. All three women had had to travel to Great Britain to access a safe and legal abortion. The facts of the case are as follows:

A became pregnant unintentionally. She was a recovering alcoholic and had children in the care of state. In the year leading up to her pregnancy she was trying to improve her personal circumstances and regain custody of her children. She felt that she would be unable to cope with another child so after delaying the abortion by three weeks and borrowing from a moneylender she travelled to England to have an abortion. A felt she had to travel “alone and in secrecy without alerting social workers and without missing a contact visit with her children”.³²

B had become pregnant unintentionally, even after having taken the morning after pill. Two doctors warned B that she risked an ectopic pregnancy. She travelled to England for an abortion, although she knew at the time of travel that the pregnancy was not ectopic. She did not feel she was ready for a child.

C was recovering from cancer when she became pregnant unintentionally. She was unable to find a doctor to determine whether the pregnancy posed a risk to her health

²⁹ *A. and B. v. Eastern Health Board* [1997] IEHC 176 as per Geoghegan J. at 15 noted in *A, B, and C* at 258.

³⁰ This ambiguity is well illustrated in the *C* Case mentioned above where although the Courts held that *C* met the criteria for abortion set out in *X*, *C* in the end travelled to the UK for an abortion which was paid for by the Irish government. See Lisa Smyth ‘**Guest Post: Smyth on A,B and C**’ <http://www.humanrights.ie/index.php/2010/12/22/guest-post-smyth-on-ab-and-c/> (Accessed June 27th 2011)

³¹ European Convention on Human Rights Act 2003
<http://www.irishstatutebook.ie/2003/en/act/pub/0020/index.html> (Accessed June 15th 2011)

³² *A, B and C v. Ireland* at 15.

or life. Furthermore, she had undergone tests related to her cancer treatment that are contra-indicated during pregnancy. Upon her return to Ireland C suffered complications of an incomplete abortion. She alleged “that doctors provided inadequate medical care. She consulted her own GP several months after the abortion and her GP made no reference to the fact that she was no longer visibly pregnant”.³³

Although the situations of the three women were markedly different, they have two features in common, which they share with many of the women who must travel to abroad to have an abortion: first, delay due to organisational issues, especially arranging finance; second, secrecy and uncertainty, which can often jeopardise continuity of care and further impact on well-being.

The ECtHR accepted that the Article 8 rights of all three applicants were engaged:

“While Article 8 cannot, accordingly, be interpreted as conferring a right to abortion, the Court finds that the prohibition in Ireland of abortion where sought for reasons of health and/or well-being about which the first and second applicants complained, and the third applicant’s alleged inability to establish her qualification for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8. The difference in the substantive complaints of the first and second applicants, on the one hand, and that of the third applicant on the other, requires separate determination of the question whether there has been a breach of Article 8 of the Convention.”³⁴

The question for the Court was whether any infringement constituted a breach of Article 8, or whether it fell within the State’s margin of appreciation. It was on this issue that the distinction between A and B as opposed to C crystallised. The Court distinguished the situation of A and B from C as follows:

The first two applicants principally complained under Article 8 about, *inter alia*, the prohibition of abortion for **health and well-being** reasons in Ireland and the third applicant’s main complaint concerned the same Article and the alleged failure to implement the constitutional right to an abortion in Ireland in the case of a **risk to the life** of the woman.³⁵

The distinction is important, as it was clear that the Court did not wish to further liberalise the law on abortion in Ireland. Rather they decided that the Irish government needed to implement an infrastructure to facilitate legal abortions within the State. A and B were travelling to have an abortion for ‘health and well-being’ reasons, and their abortions would not be legal within the State. C, however, was travelling to have an abortion because she feared that the pregnancy constituted a risk to her life; this fell within the category of legal abortions in Ireland. A and B’s claims were dismissed, as although their situations were “psychologically and physically arduous” the Court found:

³³ *A, B and C v. Ireland* at 26.

³⁴ *A, B and C* at 214.

³⁵ *A, B and C v. Ireland* at 3. [emphasis added]

“... that the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn.”³⁶

C, on the other hand, had a right to have a legal abortion and the lack of legislative framework prevented her from exercising this right. Therefore her claim was upheld. Smet summarises the decision as follows:

“The Court concluded that the uncertainty generated by the lack of legislative implementation of Article 40.3.3 had resulted in striking discordance between the theoretical right to a lawful abortion in Ireland on grounds of a relevant risk to a woman’s life and the reality of its practical implementation. Article 8 had thus been violated in the instant case.”³⁷

The decision can therefore be seen to be a logical and conservative follow-on from the decision in *Tysiac v Poland*.³⁸ In this case a visually impaired Polish woman could not access an abortion when a pregnancy posed a risk to her health through further deterioration of her sight. In Poland abortion is permissible when the health of a pregnant woman is endangered provided a doctor issues a certificate to verify its necessity. The Court found that Tysiac’s Article 8 rights had been breached. The judges in *A, B, and C* drew heavily and extensively from the judgement in that case. There are, however, some issues that merit further consideration.

B. Margin of Appreciation

One aspect of the judgement that is worthy of particular examination is how the majority of the Court applied the margin of appreciation in *A, B, and C*. Contrary to the arguments put forward by the Irish government, the Court found that there exists a wide consensus across Europe on the permissibility of abortion, noting that only three of the States which have ratified the Convention have more restrictive legislation than that found in Ireland.³⁹ Although usually consensus serves to narrow the margin of appreciation, the Court did not “consider that this consensus decisively narrows the broad margin of appreciation” afforded to Ireland on abortion.⁴⁰ The reasons for this are twofold. Firstly, the Court considered that abortion could not be disentangled from the question of when life begins, which, as noted in *Vo v France*⁴¹, is an issue about which there is no consensus.⁴² Secondly, it was noted that abortion is an issue that is still subject to much sensitivity and controversy in Ireland. On this latter justification, Paolo Ronchi suggests, that the Court risks allowing “European consensus and the

³⁶ *A, B, and C* at 241.

³⁷ Stijn Smet ‘A., B. and C. v. Ireland: Abortion and the Margin of Appreciation’ <http://strasbourgothers.com/2010/12/17/a-b-and-c-v-ireland-abortion-and-the-margin-of-appreciation/> (Accessed June 15th 2011)

³⁸ *Tysiac v. Poland* - 5410/03 [2007] ECHR 212 (24th September 2007)

³⁹ *A, B, and C* at 235.

⁴⁰ *A, B, and C* at 236 – it should be noted that there were some dissenting judgments on this point.

⁴¹ *Vo v France*, 53924/00 [2004] ECHR 326 (8 July 2004)

⁴² *A, B, and C* at 237.

harmonising role of its jurisprudence to be the handmaiden to what in one Member State is a strongly held moral view”.⁴³

C: The Will of the People

The Court rejected the view that the will of the Irish people had changed since the insertion of Article 40.3.3 (as was alleged by A and B).⁴⁴ Recent polls⁴⁵ indicate a liberalising of views on the permissibility of abortion, but the Court did not consider that “the limited opinion polls on which the first and second applicants relied ... are sufficiently indicative of a change in the views of the Irish people, concerning the grounds for lawful abortion in Ireland.”⁴⁶ Furthermore, the Court was influenced by the Irish Government’s insertion of ‘anti-abortion’ clauses in the Maastricht and Lisbon Treaties, which they took as evidence that Irish attitudes to abortion have not liberalised since the insertion of Article 40.3.3:

“In any event, the Government disputed the applicants’ suggestion that the current will of the Irish people was not reflected in the restrictions on abortion in Ireland: the opinion of the Irish people had been measured in referenda in 1983, 1992 and 2002. Its public representative had actively sought, with detailed public reflection processes including extensive consultation, to consider the possible evolution of the laws and the recent public debates as to the possible impact of Maastricht and Lisbon Treaties resulted in special Protocols to those Treaties.”⁴⁷

These clauses were born of a fear that Europeanization could lead to abortion being forced on the Irish people.⁴⁸ How the clauses came about is far from straightforward: in reality they are not simply the result of a majoritarian attitude on abortion but rather of political horse-trading to appeal to anti-abortion special interest groups in order to gain pro-Treaty majorities. As mentioned above, 1992 was an important year in the development of abortion law in Ireland. It was in this year that Irish voters had a referendum on the Maastricht Treaty. It was also the year in which the X Case brought abortion to the forefront of the Irish psyche. Prior to the X Case the Irish government drafted Protocol 17 of the Maastricht Treaty, which restricted the ability of Irish women to use Community law to over-ride the Irish Constitutional protection afforded to the unborn.⁴⁹ The Protocol was drafted prior to the Treaty being put to the Irish people and prior to the decision in X in order to ‘head off’ the possibility of the

⁴³ Paolo Ronchi ‘A B and C v Ireland Europe’s Roe v Wade still has to wait’ *Law Quarterly Review* (Forthcoming)

⁴⁴ A, B, and C at 222-226..

⁴⁵ Three-quarters of population favour liberalisation of abortion laws in Ireland’ <http://www.ifpa.ie/eng/Media-Info/News-Events/News-Events/Three-quarters-of-population-favour-liberalisation-of-abortion-laws-in-Ireland>; ‘Survey: 60% in favour of legal abortion’ <http://www.irishexaminer.com/home/survey-60-in-favour-of-legal-abortion-110224.html> (Both Accessed June 15th 2011);

⁴⁶ A, B, and C at 226.

⁴⁷ A, B and C at 183.

⁴⁸ For a detailed discussion of the link between abortion and cultural identity see Ruth Fletcher ‘Post-colonial Fragments: Representations of Abortion in Irish Law and Politics’ (2001) 28 *Journal of Law and Society* 568–89

⁴⁹ It states: “Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.” <http://europa.eu/abc/treaties/archives/en/entr3.htm> (Accessed June 28th 2011)

Catholic Church and special interests groups campaigning “against the Maastricht Treaty on the ground that European law is in danger of over-riding the provisions of Article 40.3.”⁵⁰ The advent of the *X Case* precluded the possibility that abortion would not be an issue in the discussion of the Treaty.

However, Protocol 17 should not be taken as conclusive evidence that the majority of the population at the time were against abortion. Consider van Wijnbergen’s summary of reasons for voting yes in the referendum on Maastricht:

“A survey prepared on behalf of the Dublin Office of the European Commission indicated that economic issues were the most salient factors influencing a positive vote, with employment being the top issue in the voter’s mind, followed closely by the economy of the country and financial aid for Ireland. On the other hand, the sensitive matters singled out in the campaign, women’s rights, abortion, and neutrality, were the most prominent among the anti-Maastricht voters.”⁵¹

Many of both those who were in favour of more liberal abortion laws and those who wished for more restrictive laws were against ratifying Protocol 17. And it is worth noting that Protocol 17 had, in the wake of the decision in *X*, to be accompanied by a ‘Solemn Declaration’ that it was the intention of the Contracting States:

“that the Protocol shall not limit freedom to travel between Member States or, in accordance with conditions which may be laid down, in conformity with Community law, by Irish legislation, to obtain or make available in Ireland information relating to services lawfully available in Member States.”⁵²

The Court seems to rely on this Protocol and Protocol 35 of the Lisbon Treaty (which is essentially cut and pasted from Maastricht) as evidence against the argument that the will of the people had changed.⁵³ This is at best a questionable argument which provides a shaky foundation for an already shaky application of the margin of appreciation.⁵⁴

⁵⁰ Christa van Wijnbergen ‘Ireland and the ratification of the Maastricht Treaty’ in Finn Laursen and Sophie Vanhoonacker (eds) *The Ratification of the Maastricht Treaty: Issues, Debates and Future Implications* (Dordrecht; Martinus Nijhoff Publishers, 1994) at 184.

⁵¹ Christa van Wijnbergen ‘Ireland and the ratification of the Maastricht Treaty’ in Finn Laursen and Sophie Vanhoonacker (eds) *The Ratification of the Maastricht Treaty: Issues, Debates and Future Implications* (Dordrecht; Martinus Nijhoff Publishers, 1994) at 188.

⁵² <http://europa.eu/abc/treaties/archives/en/entr3.htm> (Accessed June 27th 2011)

⁵³ Treaty of the European Union

<http://www.dfa.ie/uploads/documents/EU%20Division/EU%20Reform%20Treaty/consolidated%20eu%20treaties%20in%20english%20as%20amended%20by%20reform%20treaty%20.pdf> at 408 (Accessed June 27th 2011)

⁵⁴ See further: Christa van Wijnbergen ‘Ireland and the ratification of the Maastricht Treaty’ in Finn Laursen and Sophie Vanhoonacker (eds) *The Ratification of the Maastricht Treaty: Issues, Debates and Future Implications* (Dordrecht; Martinus Nijhoff Publishers, 1994) and the comments of Professor William Schabas at <http://humanrightsdoctorate.blogspot.com/2010/12/european-court-of-human-rights-ruling.html> (Accessed June 27th 2011)

Although the Court was concerned with current opinion within the Irish population, there is some reason to believe that the grounds for abortion have liberalised since *X*.⁵⁵ In 2006 and 2007 two cases came to the public attention: the *D* Case and *Miss D* respectively.⁵⁶ In the first of these a woman was pregnant with twins; one of whom died and the other had a condition not compatible with life outside the womb. She travelled to England to have an abortion and then brought a case to the ECtHR. Counsel for the Irish government argued that *D* had not exhausted domestic routes and would have been able to seek a declaration from the Irish courts had she applied. The Court agreed with the Irish government and dismissed the complaint as being inadmissible.⁵⁷ In 2007 *Miss D*, who was in the care of the State, was pregnant with an anencephalic foetus. The Health Services Authority, who was entrusted with the care of *Miss D*, challenged her right to travel to have an abortion. The High Court upheld *Miss D*'s right to travel. These cases suggest that one way in which judicial attitudes to abortion has liberalised is with regard to serious foetal abnormality, as in neither case was the life of the pregnant woman threatened. This suggests that a new category of legal abortion has been created. How this will work in practice is difficult to ascertain in the absence of legislative guidance.

IV. CONCLUSION

So what might we expect from the Irish government in the wake of *A, B, and C*? The government is currently made up of a coalition of the traditionally conservative Fine Gael party and the more socially liberal Labour party. This coalition was formed after the decision in *A, B, and C* and both (unsurprisingly) had different approaches to the decision in their manifesto.⁵⁸ They stated the following in their Programme for Government:

“We acknowledge the recent ruling in the European Court of Human Rights subsequent to the established ruling of the Irish Supreme Court in the *X*-Case. We will establish an expert group to address this issue, drawing on appropriate medical and legal expertise with a view to making recommendations to Government on how this matter should be properly addressed.”⁵⁹

This is a very familiar response and did nothing to quell the worries some have about continuing legislative inertia on the issue. Healy, speaking about a statement from the Taoiseach (prime minister) Enda Kenny on the issue, says the following:

“Such a political response sounds unsettlingly familiar. In 1999, the then Fianna Fail led government produced the Green Paper on abortion... the 2002 referendum attempted to roll back the ruling in the *X* Case (which would have

⁵⁵ Barbara Hewson ‘Ireland’s *Miss D*: a ‘bizarre dispute’
<http://www.abortionreview.org/index.php/site/article/186/> (Accessed June 15th 2011)

⁵⁶ Barbara Hewson ‘Ireland’s *Miss D*: a ‘bizarre dispute’
<http://www.abortionreview.org/index.php/site/article/186/> (Accessed June 15th 2011)

⁵⁷ *D v Ireland* - 26499/02 (27 June 2006)

⁵⁸ Morgan Healy ‘Irish Women Politicians and Abortion: Hope for change after the ECHR ruling’
<http://www.humanrights.ie/index.php/2011/01/10/irish-women-politicians-and-abortion-hope-for-change-after-the-echr-ruling/> (Accessed June 15th 2011)

⁵⁹ Máiréad Enright ‘*A, B and C v Ireland*: Update’ <http://www.humanrights.ie/index.php/2011/04/05/a-b-c-v-ireland-update/> (Accessed June 15th 2011)

disallowed suicide as a legal means of procuring an abortion), a tactic that was rejected by the electorate. That was the last time the Irish government attempted to ‘deal’ with the issue of abortion, leaving women and doctors in the dark in terms of when abortion is permissible in Ireland.”⁶⁰

Whether we can expect to see the end of legislative inertia on this issue is unlikely given the plan of action submitted by the government on June 16th 2011. It is clear from this that in the wake of the judgement there will be no quick or direct response to the ruling. The action plan includes the following:

12. It is intended that the Expert Group will be established by November 2011.

13. Following the recommendations from the Expert Group, proposals will be drafted and transmitted to Government for approval.

14. An Action Report will be filed outlining the Expert Group’s detailed terms of reference, membership and meeting schedule by the end of 2011.⁶¹

The Irish government has a long history of fudging the issue of abortion;⁶² and the committee to be formed in November will be one of many which have discussed the issue of abortion in Ireland.⁶³ Ideally (or optimistically?) the ruling will push the government into providing answers to the questions outlined above, thus providing clarity for both doctors and pregnant women on when abortions can legally be performed and accessed in the State. As well as empowering women in regard to when and from whom they can access legal abortions, guidance from the State would help the medical profession. As noted by the Court:

“... there is no framework whereby any difference of opinion between the woman and her doctor or between different doctors consulted, or whereby an understandable hesitancy on the part of a woman or doctor, could be examined and resolved through a decision which would establish as a matter of law whether a particular case presented a qualifying risk to a woman’s life such that a lawful abortion might be performed.”⁶⁴

Irish doctors currently work with little certainty and high levels of political pressure. Patricia Lohr, medical director of the British Pregnancy Advisory Service, succinctly captures the problematic status quo:

⁶⁰ Morgan Healy ‘Irish Women Politicians and Abortion: Hope for change after the ECHR ruling’ <http://www.humanrights.ie/index.php/2011/01/10/irish-women-politicians-and-abortion-hope-for-change-after-the-echr-ruling/> (Accessed June 15th 2011)

⁶¹ ‘ACTION PLAN A, B, and C v. Ireland Application no 25579/2005, Grand Chamber judgment 16th December 2010, Information submitted by the Government of Ireland on 16th June 2011’ <http://www.dohc.ie/press/releases/2011/20110616.html> (Accessed June 25th 2011)

⁶² ‘Anniversary Blognival: Hanafin on Human Rights and Reproduction’ <http://www.humanrights.ie/index.php/2010/08/20/anniversary-blognival-hanafin-on-human-right-bio-ethics/> (Accessed June 25th 2011)

⁶³ For a summary of these see *A, B, and C* at 62 – 88.

⁶⁴ *A, B, and C* at 253.

“As doctors we’re concerned at the needless burden of additional risk caused by treatment delays. You don’t have to be medically qualified to understand that the Irish abortion ban risks women’s physical health, requires abortions to be performed later than is necessary, and creates serious emotional upset for women at an already stressful time.”⁶⁵

Any action taken by the government is likely to be hindered and complicated by the current political and economic uncertainty in Ireland.⁶⁶ It has been reported⁶⁷ that the Department of Health and Children, within whose remit this issue falls, is much under-funded and will have to choose between legislation in the area of abortion or in the area of assisted reproduction (another area where there is evidence of government inertia⁶⁸).

Often the Irish approach to abortion is tritely described as an Irish solution to an Irish problem. This oversimplifies and ignores the broader strategy of delegation that takes place in jurisdictions worldwide and is typified in this case by the ‘Irish’ solution of delegation being facilitated through a mirrored European delegative approach. Fox and Murphy summarise the situation as follows:

[I]ronically, the 'Irish' solutions bear an intriguing resemblance to world-wide 'solutions'. Around the world, political careers lurch precariously, and 'passing the buck' becomes the solution when the personal becomes political, especially if the personal in question is abortion. It seems that there is nothing quite like it to bring out depoliticization by delegation strategies or the seeking of 'refuge in a jurisprudence of doubt'.⁶⁹

The Court, through its questionable use of the margin of appreciation and by focusing on narrow examples of the views of the Irish population, has endorsed a system where those like A and B are forced to continue to travel in their thousands each year, under shrouds of secrecy and shame, to Britain and elsewhere to access safe and legal abortion. And of course such a system relies on the mobility of those women and presumes a cosmopolitanism that is undermined by the existence of ash clouds⁷⁰ and national borders. In 2009 customs in Ireland ‘seized 1,216 packs of

⁶⁵ Patricia Lohr as quoted in Mairead Enright ‘A, B, and C v. Ireland starts today’ <http://www.humanrights.ie/index.php/2009/12/09/a-b-and-c-v-ireland-starts-today/> (Accessed June 15th 2011)

⁶⁶ For an interesting discussion of this issue see Ciara Staunton ‘As Easy as A, B and C: Will A, B and C v. Ireland Be Ireland’s Wake-up Call for Abortion Rights?’ (2011) 18 *European Journal of Health Law* 205-219.

⁶⁷ ‘Minister must prioritise laws on either abortion or fertility’

<http://www.irishexaminer.com/ireland/kfojaukfmhid/rss2/#ixzz1PLVYuzzn> (Accessed June 15th 2011)

⁶⁸ See Sheelagh McGuinness and Sorcha Ui Chonnachtaigh ‘Implications of Recent Developments in Ireland for the Status of the Embryo’ (2011) 20 *Cambridge Quarterly of Healthcare Ethics* 396 – 408.

⁶⁹ Marie Fox and Therese Murphy ‘Irish Abortion: Seeking Refuge in a Jurisprudence of Doubt and Delegation’ (1992) 19 *Journal of Law and Society* 454-455

⁷⁰ ‘Irish women need cash not ash!’ Abortion Support Network: Annual Report 2010 http://www.abortionsupport.org.uk/files/2011/01/ASN_2010_Annual_Report.pdf (Accessed June 15th 2011)

illegal abortion drugs.’⁷¹ Concern has also been expressed about illegal abortions taking place within the State.⁷² These abortions are a necessity for those women for whom travel is not just difficult but impossible.⁷³ If one such woman were to bring a case would the ECtHR accept that current legislation falls within the margin of appreciation? Travel in these circumstances would not merely be ‘psychologically and physically arduous’: it would not be an option. Would the Irish Government’s ‘choice’ to deal with abortion through allowing the provision of information and travel when travel is not possible still fail to breach Article 8 rights?

The strong opinions of the dissenting judgments, and the government’s apparent procrastination, suggest that this is an issue that will be revisited. But for now at least it seems that delegation (if not doubt) will remain.

⁷¹ ‘Customs seized 1,216 packs of illegal abortion drugs in 2009’ <http://www.irishtimes.com/newspaper/frontpage/2010/1026/1224282004957.html> (Accessed June 15th 2011)

⁷² ‘Customs seized 1,216 packs of illegal abortion drugs in 2009’ <http://www.irishtimes.com/newspaper/frontpage/2010/1026/1224282004957.html>; ‘Concern on illegal Irish abortions’ <http://www.irishhealth.com/article.html?id=7940> (Both Accessed June 15th 2011)

⁷³ Mary Gilmartin ‘Abortion and the Politics of Mobility: Gilmartin on A, B and C.’ <http://www.humanrights.ie/index.php/2010/12/23/abortion-and-the-politics-of-mobility-gilmartin-on-a-b-and-c/> (Accessed June 15th 2011)